FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MDD/148456

PRELIMINARY RECITALS

Pursuant to a petition filed November 08, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance (MA), a telephonic hearing was held on April 23, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether petitioner is disabled for MA purposes.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: No Appearance

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. Petitioner is 47 years old. She has been diagnosed with osteoarthritis and allied disorders, back pain, gastrointestinal disorders, emphysema, dysthymic disorder, hypertension, Bells Palsy, hernia and migraines.
3. On or about March 29, 2012 petitioner applied for disability through the state MA program. She did not apply for federal disability through the Social Security Administration.

4. On November 1, 2012 the Disability Determination Bureau (DDB) concluded petitioner was not disabled, as it did not appear her impairments were severe enough to be considered disabling.

5. Petitioner filed a MA-Reconsideration Request and on or about March 27, 2013 her reconsideration request was again denied by the DDB.

DISCUSSION

In order to be eligible for MA as a disabled person, an applicant must meet the same tests for disability as those used by the Social Security Administration to determine disability for Supplemental Security Income (Title XVI benefits). Wis. Stat. §49.47(4)(a)4. Title XVI of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments that can be expected to either result in death or last for a continuous period of not less than 12 months. 20 C.F.R. § 404.1505. Therefore, this examiner is required to review the petitioner's current MA appeal utilizing the same tests for disability as those used by the Social Security Administration in determining disability for Supplemental Security Income (Title XVI benefits).

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. Thus, while the observations, diagnoses, and test results reported by a physician are relevant evidence, the opinions of the doctors as to whether an individual is disabled are not conclusive as to that determination.

In addition, the definitions of disability in the regulations governing MA, Supplemental Security Income (SSI), and Social Security Disability Income Insurance (SSDI) programs require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it is severe, that it affects an individual's basic work activities, and that it will last 12 months or longer as a severe impairment.

THE FIVE-STEP DISABILITY DETERMINATION PROCESS

The above requirements are delineated in five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will be found to be not disabled regardless of medical findings. However, if an individual is not working, or is working but earning less than $1040 per month, proceed to Test #2. 20 C.F.R. § 416.920(b)

2. An individual who does not have a "severe impairment" which significantly limits his or her ability to work will be found not disabled. However, if an individual is found to have a severe impairment, proceed to Test #3. 20 C.F.R. § 416.920(c)

3. If the individual's severe impairment meets or equals a listing in 20 C.F.R. § 404, subpart P, Appendix 1, that individual will be determined disabled. However, if the individual's severe impairment does not meet or equal a listing, proceed to Test #4. 20 C.F.R. § 416.920(d)

4. If the individual is capable (has the Residual Functional Capacity) to perform past work, the individual will be determined not disabled. However, if the individual does not have the capacity to perform past work, proceed to Test #5. 20 C.F.R. § 416.920(e)

(Note, if the individual has marginal education (less than 7th grade) and work experience of 35 or more years of unskilled arduous physical labor and can no longer perform past work at a customary exertional level, he or she will be determined disabled under 20 C.F.R. § 416.962) 20 C.F.R. § 416.920(f)(2)

5. If the individual is capable of performing any substantial gainful activity in the national economy, that individual will be determined not disabled. However, if the individual cannot perform any substantial gainful activity in the national economy, that individual will be determined disabled. 20 C.F.R. § 416.920(f)(1)

If it is determined that an applicant for MA is not disabled at the second step in the review, it is not necessary to review the case under any later test or tests. 20 C.F.R. §404.1521.

PROCESSING OF PETITONER'S DISABILITY APPLICATION

For Test #1, petitioner is currently not working and therefore passes Test #1.

For Test #2, in determining whether a disability is "severe" under 20 C.F.R. §416.920(c), the Bureau applies the following test:

> If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education and work experience.

In this particular case, the Bureau determined petitioner has a severe impairment of a physical or mental nature. Therefore, I will proceed to the next step.

For Test #3, it must be determined whether petitioner's impairments meet the durational requirement and meet or equal a "listing." For impairments which are listed in the "Listing of Impairments" in the federal regulations, a person is considered disabled if his or her impairment meets or exceeds the level of severity described in the listing for that specific impairment. 20 C.F.R. § 416.926(a) describes how a listing is found to be met or equaled:

> We will decide that your impairment(s) is medically equivalent to a listed impairment in appendix 1 of subpart P of part 404 of this chapter if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the medical criteria shown with the listed impairment.

If an individual is determined to have more than one impairment, but none of them meets or equals a listed impairment, the symptoms, signs, and laboratory findings of the individual's impairments will be compared with those for closely analogous listed impairments. 20 C.F.R. § 416.926(a)(2). The reason is to determine whether the combination of the impairments is medically equal to any listed impairment.

I agree with the Bureau's determination that petitioner's impairments do not meet or equal a specific listing. Therefore, as there has been no equivalency asserted regarding a specific listing as related to petitioner's severe impairment, I must conclude a specific listing has not been met, petitioner has not been determined disabled, and Test #3 has been passed.

For Test #4, the Bureau found petitioner was capable of performing other work, and therefore found her not disabled. In addition, she does not meet the exception listed at Test #4, as she does not have 35 or more years of unskilled arduous physical labor that she can no longer perform at the customary level and she has more than a "marginal" (7th grade) education, having completed the 12th grade. When the Bureau reviewed petitioner's residual functional capacity to perform other work it was determined petitioner's ability to do work activities was not so significantly limited by her condition(s) that she must be found disabled. Petitioner's physical and mental limitations were considered in making this determination.

The DDB found that, given her substantial ability to perform many work related, or work like, tasks, that she retained the residual functional capacity (RFC) to perform light work, citing Vocational Rule 202.20 as the guideline for this decision. Light level work means frequent carrying of objects up to 10 pounds and occasional carrying of objects up to 20 pounds. 20 C.F.R. §416.967. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time. The problem for petitioner is that even if she were limited to sedentary work, the lowest level, she still would be found not disabled. Sedentary work involves lifting no more than ten pounds with frequent lifting of small articles. 20 C.F.R. §416.967(a). This was established through petitioner's medical records that her capabilities were such.

After reviewing the petitioner's testimony about her abilities to perform various activities of daily living and a review of the medical findings, I also find that the petitioner retains the ability to perform light work. She takes care of herself with all activities of daily living (ADLs). She even takes care of her mother on occasion with her medications and groceries. She drives and is enrolled in school. I simply do not have other conclusive evidence before me, other than petitioner's self-serving testimony, that her limitations are greater or worse than what was reviewed. I must conclude that the DDB was correct. The petitioner does not qualify for Medical Assistance as a disabled person. The denial decision must be affirmed.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. If her conditions worsen, or she develops better evidence, she can always reapply.

CONCLUSIONS OF LAW

Petitioner is not disabled as required for MA eligibility.

THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 10th day of May, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 10, 2013.

Milwaukee Enrollment Services
Disability Determination Bureau